But the patentee went further in a recent case. By a system of licenses of a patented tool, useful but not indispensable in the manufacture of bathtubs, the patentee fixed non-competitive prices on the unpatented bathtubs in the hands of manufacturers and dealers. *United States* v. *Standard Sanitary Mfg. Co.*, 191 Fed. 172 (Circ. Ct., D. Md.). The system was held illegal under the Sherman Act. The patentee's right to monopoly in the patented article was held to protect him no further. The distinction between this and the last class of cases seems clear. In them reselling prices were not regulated, and as to selling competition had freer play. Moreover, the articles were incidental to the patented device. Judged by the light of reason, such incidental restrictions on incidental articles may well be valid.[23]

Again, where the owners of different patents restrict competition between themselves the monopoly is extended beyond that conferred by the patent grant.[24] For the imperfect competition between the patented articles is thus destroyed. The right to exclude others from the patented article alone does not sanction the suppressing of competition with a different article, though patented. The scheme is clearly illegal if the restriction of competition between the different patentees extends beyond the life of their patents,[25] or includes articles not patented.[26]

DISCRIMINATION BY RAILROADS IN ELEVATOR ALLOWANCES TO SHIPPERS. — The utilization of control over the instrumentalities of public service to foster monopolies in other trades constitutes one great vice of most discrimination.[1] It is well established that public service companies must not take advantage of their exceptional position to discriminate in favor of their collateral business undertakings.[2] Wherever they engage in serving themselves, the obvious opportunity for secret discrimination justifies suspicious scrutiny and restriction.[3] The danger inherent in such combinations of conflicting interests has even been held sufficient to render them illegal *per se*.[4] Thus interstate carriers are forbidden to

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[23] Possibly the vendor of an ordinary chattel may similarly require the purchase of incidental supplies as part of the price.

[24] Blount Mfg. Co. *v.* Yale & Towne Mfg. Co., 166 Fed. 555; National Harrow Co. *v.* Quick, 67 Fed. 130; National Harrow Co. *v.* Hench, 83 Fed. 36. *Contra*, United States Consolidated Seeded Raisin Co. *v.* Griffin & Skelley Co., 126 Fed. 364; Central Shade-Roller Co. *v.* Cushman, 143 Mass. 353, 9 N. E. 629.

[25] Strait *v.* National Harrow Co., 18 N. Y. Supp. 224.

[26] Vulcan Powder Co. *v.* Hercules Powder Co., 96 Cal. 510, 31 Pac. 581; State *v.* Creamery Package Mfg. Co., 110 Minn. 415, 126 N. W. 126, 623. *Cf.* Straus *v.* American Publishers' Association, 177 N. Y. 473, 69 N. E. 1107.

[1] See Hays *v.* Pennsylvania Co., 12 Fed. 309, 313; Scofield *v.* Railway Co., 43 Oh. St. 571, 609, 3 N. E. 907, 923.

[2] Brass *v.* North Dakota *ex rel.* Stoeser, 153 U. S. 391, 14 Sup. Ct. 857; Louisville Transfer Co. *v.* American District Tel. Co., 1 Ky. L. J. 144.

[3] New York, N. H. & H. R. Co. *v.* Interstate Commerce Commission, 200 U. S. 361, 26 Sup. Ct. 272; In the Matter of Grain Rates, 7 Interst. C. Rep. 33. See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, § 1359.

[4] Central Elevator Co. *v.* People *ex rel.* Moloney, 174 Ill. 203, 51 N. E. 254; Hannah *v.* People *ex rel.* Attorney General, 198 Ill. 77, 64 N. E. 776. See 1 WYMAN, PUBLIC SERVICE CORPORATIONS, § 710; 20 HARV. L. REV. 511, 529–531.

transport commodities in which they have an interest.[5] But shippers of goods have always been allowed to profit simultaneously as lessors of the facilities for their transportation,[6] and this is now expressly permitted by the Interstate Commerce Act.[7] But shippers who are unwilling or unable to invest in this independent, incidental business should be entitled to demand service in all ways equivalent to that which others are permitted or invited to provide for themselves.[8] The latter should receive the fair rental value of their property, but no favored position as to the public service itself by reason of their dual character.[9] Their coöperation cannot relieve the carrier of its primary public duty to furnish facilities for all without discrimination.[10]

Consequently, when the Interstate Commerce Commission, having permitted[11] an allowance for transhipment at the Missouri River of grain belonging largely to the elevator owners, found, on rehearing, that they were taking advantage of access to their own grain during elevation to clean, clip, mix, and grade it, from which treatment arose their greatest profit, as dealers, it forbade further compensation for the transfer of grain so treated.[12] The Supreme Court has recently held[13] that in this the commission exceeded its powers, apparently on the ground that Congress had authorized allowances to shippers for every use of facilities, irrespective of preferential advantages involved in the use.[14] *Interstate Commerce Commission* v. *Diffenbaugh*, 32 Sup. Ct. 22. But if their right to compensation is as agencies in the public service of transportation, the carrier should not permit these elevators in that capacity

[5] 34 U. S. STAT. AT LARGE, c. 3591, p. 585, FED. STAT., SUPP., 1909, 257. See United States *v.* Lehigh Valley R. Co., 220 U. S. 257, 273, 31 Sup. Ct. 387, 391.

[6] See Chicago & A. Ry. Co. *v.* United States, 156 Fed. 558, 561. But see In the Matter of Elevator Allowances, 10 Interst. C. Rep. 309, 326; 12 *id.* 85, 88.

[7] 34 U. S. STAT. AT LARGE, c. 3591, p. 589, FED. STAT., SUPP., 1909, 266. All such allowances must be scheduled and offered to persons and places without discrimination. Wisconsin Ry. Co. *v.* United States, 169 Fed. 76; Atchison *v.* Missouri Pacific Ry. Co., 12 Interst. C. Rep. 111.

[8] State *ex rel. v.* C. N. O. & T. P. Ry. Co., 47 Oh. St. 130, 23 N. E. 928; Rice *v.* Louisville & Nashville R. Co., 1 Interst. C. Rep. 722. See Penn Refining Co. *v.* Western N. Y., etc. R. Co., 208 U. S. 208, 220, 28 Sup. Ct. 268, 273.

[9] Chicago & A. R. Co. *v.* Interstate Commerce Commission, 173 Fed. 930. The lower federal court in the principal case, *infra*, did not distinguish advantages attributable only to a favored position in point of service from the legitimate additional return above other shippers for the use of facilities. Peavey *v.* Union Pacific R. Co., 176 Fed. 409. The slight advantage of information of competing shipments seems unavoidable when leasing is permitted. See Consolidated Forwarding Co. *v.* Southern Pacific Co., 9 Interst. C. Rep. 182, 206 e; Muskogee Commercial Club *v.* Missouri, etc. Ry. Co., 12 Interst. C. Rep. 312, 317.

[10] Chesapeake & Ohio Ry. Co. *v.* Standard Lumber Co., 174 Fed. 107. This is held in cases requiring private coal cars to be counted against their owners in distribution of facilities among shippers. Chicago & A. R. Co. *v.* Interstate Commerce Commission, *supra*; United States *v.* Baltimore & Ohio R. Co., 165 Fed. 113. See Interstate Commerce Commission *v.* Illinois Central R. Co., 215 U. S. 452, 469, 477, 30 Sup. Ct. 155, 161, 163.

[11] In the Matter of Elevator Allowances, 10 Interst. C. Rep. 309; 12 *id.* 85.

[12] In the Matter of Elevator Allowances, 14 Interst. C. Rep. 315; Traffic Bureau, etc. *v.* Chicago, Burlington & Quincy R. Co., *id.* 317.

[13] Mr. Justice McKenna dissented with an opinion in which Mr. Justice Hughes concurred.

[14] See Union Pacific R. Co. *v.* Updike Grain Co., 32 Sup. Ct. 39, 41.

to perform a greater service for themselves as shippers than for other shippers.[15]

The statute permits compensation only for services in transportation.[16] Here the very unloading and reloading for which these owners are paid constitutes, as to their own grain, an expensive, inseparable part of a commercial process,[17] the entire expense of which they would normally charge to their private business as grain dealers, as other shippers are obliged to do. To permit milling, dressing, or otherwise treating in transit is not a part of the duty of transportation, but is a privilege commonly accorded by carriers, ordinarily for a slight additional charge.[18] All such privileges must be scheduled with the published rates,[19] and the carrier in granting them must not discriminate between localities or persons.[20] It seems that the expense of performing such treatment for all shippers alike may under some circumstances be absorbed in the rate for transportation;[21] but there is no precedent authorizing the carrier to share the cost of the operation for those shippers alone owning elevators,[22] or to afford to them, without undergoing any expense for unloading, an opportunity to treat in transit which is not scheduled nor offered to other shippers.[23] It is submitted, therefore, that the compensation is not in fact for services in transportation, but a contribution to the commercial expenses of some dealers, to the serious prejudice of their competitors.

RAILROAD RECEIVERS. — Public interest requires that railroads shall continue to serve the public even though they have drifted into financial difficulties.[1] To permit this and to prevent mortgagees from foreclosing

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[15] *Cf.* Southern Pacific Terminal Co. *v.* Interstate Commerce Commission, 219 U. S. 498, 31 Sup. Ct. 279; United States *v.* Oregon R., etc. Co., 159 Fed. 975; Interstate Commerce Commission *v.* Reichmann, 145 Fed. 235.

[16] The material part of section 4 of the Act reads as follows: "If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable. . . ." 34 U. S. STAT. AT LARGE, c. 3591, p. 589, FED. STAT., SUPP., 1909, 266.

[17] Chicago & A. Ry. Co. *v.* United States, *supra*; General Electric Co. *v.* New York Central, etc. R. Co., 14 Interst. C. Rep. 237; Solvay Process Co. *v.* D. L. & W. R. Co., 14 *id.* 246. These cases held that no allowance could be made for the use of internal transportation facilities essential to the economical conduct of large commercial plants.

[18] Southern Ry. Co. *v.* St. Louis Hay & Grain Co., 214 U. S. 297, 29 Sup. Ct. 678; In the Matter of Cotton Rates, 8 Interst. C. Rep. 121, 135; Diamond Mills *v.* Boston & Maine R. Co., 9 *id.* 311.

[19] 34 U. S. STAT. AT LARGE, c. 3591, p. 584, FED. STAT., SUPP., 1909, 260. See Central Yellow Pine Association *v.* Vicksburg, etc. R. Co., 10 Interst. C. Rep. 193, 216; In the Matter of Cotton Rates, *supra*, 135.

[20] See Southern Ry. Co. *v.* St. Louis Hay & Grain Co., *supra*, 300; Muskogee Commercial Club *v.* Missouri, etc. Ry. Co., *supra*, 317; State *ex rel.* Railroad Commissioners *v.* Atlantic Coast Line R. Co., 59 Fla. 612, 623, 52 So. 4, 8.

[21] Merchant's Cotton Press & Storage Co. *v.* Illinois Central R. Co., 17 Interst. C. Rep. 98.

[22] *Cf.* Wight *v.* United States, 167 U. S. 512, 17 Sup. Ct. 822; Evershed *v.* London & N. W. Ry. Co., 2 Q. B. D., 254.

[23] *Cf.* Southern Pacific Terminal Co. *v.* Interstate Commerce Commission, *supra*.

[1] Fosdick *v.* Schall, 99 U. S. 235. See JONES, CORPORATE BONDS AND MORTGAGES, § 555.